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15 **UNITED STATES DISTRICT COURT**  
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN JOSE DIVISION**

18 UNITED STATES OF AMERICA,  
19  
20 Plaintiff,

21 v.

22 EBAY, INC.

23 Defendant.

Case No. C

24 **COMPLAINT**

25 The United States of America, acting under the direction of the Attorney General  
26 of the United States, brings this civil antitrust action to obtain equitable relief against  
27 Defendant eBay, Inc. ("eBay"), alleging as follows:

28 **NATURE OF THE ACTION**

1. This action challenges under Section 1 of the Sherman Act a no-solicitation and no-hiring agreement between eBay and Intuit, Inc. ("Intuit"), pursuant to which eBay and Intuit agreed not to recruit each other's employees and eBay agreed

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Filed

NOV 16 2012

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

PSG

CV 12\_5869

1 not to hire Intuit employees, even those that approached eBay for a job. This agreement  
2 harmed employees by lowering the salaries and benefits they might otherwise have  
3 commanded, and deprived these employees of better job opportunities at the other  
4 company. Meg Whitman, then the CEO of eBay, and Scott Cook, Founder and  
5 Chairman of the Executive Committee at Intuit, were intimately involved in forming,  
6 monitoring, and enforcing this anticompetitive agreement.

7 2. Senior executives at eBay and Intuit entered into an evolving “handshake”  
8 agreement to restrict their ability to recruit and hire employees of the other company.  
9 The agreement, which was entered into no later than 2006, prohibited either company  
10 from soliciting one another’s employees for employment opportunities, and, for over a  
11 year, prevented at least eBay from hiring any employees from Intuit at all. The  
12 agreement was enforced at the highest levels of each company.

13 3. The agreement reduced eBay’s and Intuit’s incentives and ability to  
14 compete for employees and restricted employees’ mobility. This agreement thus  
15 harmed employees by lowering the salaries and benefits they otherwise would have  
16 commanded, and deprived these employees of better job opportunities at the other  
17 company.

18 4. This agreement between eBay and Intuit is a naked restraint of trade that is  
19 per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1. The United States  
20 seeks an order prohibiting any such agreement and other relief.

### 21 JURISDICTION AND VENUE

22 5. eBay hires specialized computer engineers, scientists, and other employees  
23 throughout the United States, and sells products and services throughout the United  
24 States. Such activities, including the recruitment and hiring activities at issue in this  
25 Complaint, are in the flow of and substantially affect interstate commerce. The Court  
26 has subject matter jurisdiction under Section 4 of the Sherman Act, 15 U.S.C. § 4, and  
27 under 28 U.S.C. §§ 1331 and 1337 to prevent and restrain the Defendant from violating  
28 Section 1 of the Sherman Act, 15 U.S.C. § 1.

1           6. Venue is proper in this judicial district under Section 12 of the Clayton  
2 Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391(b)(2), (c). eBay transacts or has  
3 transacted business in this district and has its principal place of business here. A  
4 substantial part of the events that gave rise to this action occurred here.

#### 5                           **INTRADISTRICT ASSIGNMENT**

6           7. Venue is proper in the San Jose Division because this action arose  
7 primarily in Santa Clara County. Civil L.R. 3-2(c), (e). A substantial part of the events  
8 that gave rise to the claim occurred in Santa Clara County, and eBay has its principal  
9 place of business in Santa Clara County. Judge Koh in the San Jose Division is  
10 currently presiding over a case that is similar in certain respects. In addition, the  
11 Attorney General of the State of California is filing a Complaint that is related to the  
12 United States' Complaint, pursuant to the requirements of Local Rule 3-12(a).

#### 13                           **DEFENDANT**

14           8. eBay is a Delaware corporation with its principal place of business in San  
15 Jose, California.

#### 16                           **CO-CONSPIRATORS**

17           9. Various other corporations and persons not made defendants in this  
18 Complaint, including Intuit and senior executives at Intuit and eBay, participated as co-  
19 conspirators in the violation alleged and performed acts and made statements in  
20 furtherance of the violation alleged. Intuit is not named as a defendant in this action  
21 because Intuit is subject to a court order in United States v. Adobe Systems, No. 10-  
22 01629 (D.D.C. judgment entered Mar. 17, 2011), barring it from entering into or  
23 enforcing any agreement that improperly limits competition for employee services.

#### 24                           **TRADE AND COMMERCE**

25           10. Firms in the same or similar industries often compete to hire and retain  
26 talented employees. This is particularly true in technology industries in which  
27 particular expertise and highly specialized skills sought by one firm can often be found  
28 at another firm. Solicitation of skilled employees at other companies is an effective

1 method of competing for needed employees. For example, Beth Axelrod, eBay's  
2 Senior Vice President for Human Resources at the time the agreement with Intuit was in  
3 effect, co-authored a book, "The War for Talent," which emphasizes the importance of  
4 "cold-calling" as a recruitment tool: "The recruiting game is changing for yet another  
5 reason: It's no longer sufficient to target your efforts to people looking for a job; you  
6 have to reach people who aren't looking."

7 11. eBay's agreement with Intuit eliminated this competition. The agreement  
8 harmed employees by reducing the salaries, benefits, and employment opportunities  
9 they might otherwise have earned if competition had not been eliminated. The  
10 agreement also misallocated labor between eBay and Intuit—companies that drove  
11 innovation based in no small measure on the talent of their employees. In a well-  
12 functioning labor market, employers compete to attract the most valuable talent for their  
13 needs. Competition among employers for skilled employees may benefit employees'  
14 salaries and benefits, and facilitates employee mobility. The no-solicitation and no-  
15 hiring agreement between Intuit and eBay distorted this competitive process and likely  
16 resulted in some of eBay's and Intuit's employees remaining in jobs that did not fully  
17 utilize their unique skills. Ms. Axelrod and her co-authors described how the  
18 "structural forces fueling the war for talent" have resulted in power "shift[ing] from the  
19 corporation to the individual," giving "talented individuals . . . the negotiating leverage  
20 to ratchet up their expectation for their careers."

21 12. Instead of working harder to acquire this critical and scarce talent, eBay  
22 and Intuit called a truce in the "war for talent" to protect their own interests at the  
23 expense of their employees. eBay initially sought a limited no-solicitation agreement  
24 aimed at high-level executives. eBay ultimately agreed to an expansive no-solicitation  
25 and no-hire agreement in large part to placate Intuit's Mr. Cook, who was serving as a  
26 member of eBay's Board of Directors and who, at the same time, was making several  
27 complaints on behalf of Intuit about eBay's hiring practices. eBay elevated the interests  
28 of Mr. Cook above the welfare of its own employees. Similarly, Mr. Cook was willing

1 to sacrifice the welfare of Intuit's employees in order to advance his own personal  
2 interests in serving on eBay's Board.

3 13. Neither eBay nor Intuit publicly announced their no hire/no solicit  
4 agreement or ensured that all potentially affected employees were aware of the  
5 agreement. Disclosure of the agreement could have created substantial legal problems  
6 for eBay and Intuit under California law and significant embarrassment for the  
7 executives and other individuals who entered into, and monitored compliance with, the  
8 agreement on behalf of the two firms. Many eBay and Intuit employees reside in  
9 California, a state with a strong public policy prohibiting firms from restricting  
10 employee movement by, among other things, barring employers from enforcing "no  
11 compete" agreements. California law provides that "every contract by which anyone is  
12 restrained from engaging in a lawful profession, trade, or business of any kind is to that  
13 extent void." California Business & Professions Code § 16600.

#### 14 THE UNLAWFUL AGREEMENT

15 14. Beginning no later than 2006, and lasting at least until 2009, Intuit and  
16 eBay maintained an illegal agreement that restricted their ability to actively recruit  
17 employees from each other, and for some part of that time, further restricted eBay from  
18 hiring any employees from Intuit. As alleged in more detail below, this agreement was  
19 entered into and enforced at the most senior levels of these two companies.

20 15. In November 2005, eBay's Chief Operating Officer, Maynard Webb,  
21 wrote to Scott Cook, Intuit's Founder and Chairman of its Executive Committee, to "get  
22 [Mr. Cook's] advice on a specific hiring situation and then see if we could establish  
23 some guidelines on an ongoing basis." Mr. Webb asked Mr. Cook for "permission to  
24 proceed" with hiring an Intuit employee who had contacted eBay regarding a job, and  
25 then proposed a "structure" to Mr. Cook for future situations, whereby eBay would "not  
26 actively recruit from Intuit." Under Mr. Webb's proposal, for Intuit candidates "below  
27 Senior Director level" who contacted eBay regarding employment, eBay would be  
28 permitted to hire them and would give Intuit "notice" only after a candidate accepted a

1 job offer. For Intuit candidates “at Senior Director level or above,” eBay would not  
2 make an offer unless Intuit was notified in advance. Mr. Cook rejected this proposal  
3 insofar as it allowed hiring of any employees without prior notice to Intuit, saying that  
4 “we don’t recruit from board companies, period” and “[w]e’re passionate on this.” In  
5 other words, because Mr. Cook served on eBay’s board, Intuit employees should be  
6 denied any chance to work for eBay. Mr. Cook committed that Intuit would not make  
7 an offer to anyone from eBay without first notifying eBay, and said “[w]e would ask the  
8 same.”

9 16. A month later, in December 2005, Meg Whitman, the CEO of eBay at the  
10 time, and Mr. Cook discussed the competition for two employees with an eye toward  
11 eliminating that competition altogether. As Ms. Whitman told Ms. Axelrod, Mr. Cook  
12 was “slightly miffed by our recent hire of two Intuit executives.”

13 17. No later than August 2006, the initial agreement between eBay and Intuit  
14 restricting the hiring of each other’s employees was put into effect. In August 2006,  
15 when eBay considered hiring an Intuit employee for an opening at its PayPal subsidiary,  
16 Ms. Axelrod said that while she was “happy to have a word with Meg [Whitman] about  
17 it,” Ms. Axelrod was “quite confident she will say hands off because Scott [Cook]  
18 insists on a no poach policy with Intuit.” When the PayPal executive asked Ms.

19 Axelrod to confer with Ms. Whitman, Ms. Axelrod reported back that “I confirmed with  
20 Meg [Whitman] that we cannot proceed without notifying Scott Cook first.” eBay does  
21 not appear to have pursued the potential candidate beyond this point as everyone agreed  
22 “that it’s to[o] awkward to call Scott [Cook] when we don’t even know if the candidate  
23 has interest,” demonstrating that the non-solicitation agreement had a distinct chilling  
24 effect on recruitment and hiring between the two companies.

25 18. On or about April 2007, eBay’s commitment metastasized into a no-hire  
26 agreement. The impetus was a complaint from Mr. Cook to Ms. Whitman that he was  
27 “quite unhappy” about a potential offer that eBay was going to make to an Intuit  
28 employee who had approached eBay. Ms. Axelrod spoke with Ms. Whitman regarding

1 Mr. Cook's concerns, and instructed David Knight, then eBay's Vice President, Internal  
2 Communications, to hold off on making the offer. Mr. Knight urged Ms. Axelrod to  
3 find a way to make the offer happen, as the decision put the applicant "in a tough  
4 position and us in a bad place with California law" and left eBay "another 6 months  
5 away from getting another candidate" for the position. A week later, Mr. Knight wrote  
6 to Ms. Axelrod and Ms. Whitman pleading with them to at least "negotiate" any shift  
7 from a "no poaching" agreement to a "no hiring" agreement after this particular  
8 applicant was hired, as eBay "desperately need[ed] this position filled."

9 19. While Ms. Axelrod ultimately authorized Mr. Knight to extend an offer to  
10 this Intuit employee, eBay did expand the agreement to prohibit eBay from hiring any  
11 employee from Intuit, regardless of how that employee applied for the job. A few  
12 months later, for example, an eBay human resources manager alerted Ms. Axelrod to a  
13 potential "situation" and wanted to know if eBay "continue[d] to be sensitive to Scott  
14 [Cook]'s request" or if there was "any flexibility on hiring from Intuit." The Intuit  
15 candidate was "getting a lot of responses from managers directly" before the human  
16 resource manager's team was involved as his "education is fantastic." Ms. Axelrod  
17 confirmed, however, that even when an Intuit employee was "dying" to work for eBay  
18 and had proactively reached out to eBay, hiring managers had "no flexibility" and must  
19 keep their "hands off" the potential applicant.

20 20. Two eBay staffers sought to clarify the situation with Ms. Axelrod shortly  
21 thereafter. Ms. Axelrod said: "We have an explicit hands off[f] that we cannot violate  
22 with any Intuit employee. There is no flexibility on this." The staff asked for further  
23 amplification: "This applies even if the Intuit employee has reached out and  
24 specifically asked? If so then I assume that person could NEVER be hired by ebay  
25 unless they quit Intuit first." Ms. Axelrod confirmed this was "correct." Ms. Axelrod  
26 similarly explained the impact of the agreement to Ms. Whitman: "I keep getting  
27 inquiries from our folks to recruit from Intuit and I am firmly holding the line. No  
28 exceptions even if the candidate proactively contacts us." In another email exchange,

1 Ms. Axelrod explained that she was responding to all inquiries regarding hiring from  
2 Intuit by “firmly holding the line and saying absolutely not (including to myself since  
3 their comp[ensation] and ben[efits] person is supposed to be excellent!).”

4 21. Mr. Cook was a driving force behind eBay’s no-hire agreement with  
5 Intuit. In one 2007 e-mail, an eBay recruiter confirmed to Intuit that the message to  
6 Intuit candidates should be that eBay was “not allowed to hire from Intuit per Scott  
7 Cook regardless of whether the candidate applies directly or if we reach out.” eBay  
8 recruiting personnel understood that “Meg [Whitman] and Scott Cook entered into the  
9 agreement (handshake style, not written) that eBay would not hire from Intuit, period.”  
10 Mr. Cook and Intuit, on the other hand, agreed that Intuit would not recruit from eBay.  
11 Mr. Cook explained to one applicant who had decided to work for eBay but expressed a  
12 future interest in joining Intuit, that “Intuit is precluded from recruiting you” unless  
13 eBay has decided it does not need the employee or where the employee informs his  
14 management and then proactively contacts Intuit.

15 22. eBay insisted that Intuit refrain from recruiting its employees in exchange  
16 for the limitation on eBay’s ability to recruit and hire Intuit employees. On August 27,  
17 2007, Ms. Axelrod wrote Ms. Whitman to complain that while eBay was sticking to its  
18 agreement not to hire Intuit employees, “it is hard to do this when Intuit recruits our  
19 folks.” Ms. Axelrod forwarded Ms. Whitman a recruiting flyer that Intuit had sent to an  
20 eBay employee. Ms. Whitman forwarded Ms. Axelrod’s e-mail to Mr. Cook the same  
21 day asking him to “remind your folks not to send this stuff to eBay people.” Mr. Cook  
22 responded quickly: “#@!%\$#^&!!! Meg my apologies. I’ll find out how this slip up  
23 occurred again. . . .”

24 23. Throughout the course of the agreement, eBay repeatedly declined  
25 opportunities to hire or interview Intuit employees, even when eBay had open positions  
26 for “quite some time,” when the potential employee “look[ed] great,” or when “the only  
27 guy who was good was from [I]ntuit.” eBay employees were instructed not to pursue  
28 potential hires that came from Intuit and to discard their resumes. When a candidate

1 applied for a position and told eBay that she had left Intuit, Ms. Axelrod went so far as  
2 to write Mr. Cook to confirm that the applicant had, in fact, left the company.

3 24. The companies acknowledged that throughout the agreement, they  
4 “passed” on “talented” applicants, consistent with their anticompetitive agreement. The  
5 repeated requests from lower level employees at both companies to be allowed to  
6 recruit employees from the other firm demonstrates that the agreement denied  
7 employees the opportunity to compete for better job opportunities.

8 25. The agreement between eBay and Intuit remained in effect for at least  
9 some period of time after a United States Department of Justice investigation of  
10 agreements between technology companies that restricted hiring practices became  
11 public. One eBay employee asked another in June 2009 if she had been “able to  
12 connect with Beth [Axelrod] re our policies around hiring from Intuit with respect to” a  
13 former employee at eBay’s PayPal division who “wishes to return” and noted press  
14 reports of the Department of Justice investigation. The employee responded: “It’s a no  
15 go . . . . too complicated. We should move to plan b.” (Ellipses in original.)

#### 16 VIOLATION ALLEGED

##### 17 (Violation of Section 1 of the Sherman Act)

18 26. ~~The United States hereby incorporates paragraphs 1 through 25.~~

19 27. eBay and Intuit are direct competitors for employees, including  
20 specialized computer engineers and scientists, covered by the agreement at issue here.  
21 eBay and Intuit entered into a naked no-solicitation and no-hire agreement, thereby  
22 reducing their ability and incentive to compete for employees. This agreement  
23 suppressed competition between eBay and Intuit, thereby limiting affected employees’  
24 ability to secure better compensation, benefits, and working conditions.

25 28. eBay’s agreement with Intuit is per se unlawful under Section 1 of the  
26 Sherman Act, 15 U.S.C. § 1. No elaborate industry analysis is required to demonstrate  
27 the anticompetitive character of this agreement.  
28

The United States requests that:

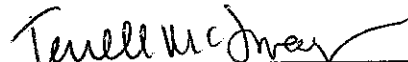
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Dated: November 15, 2012

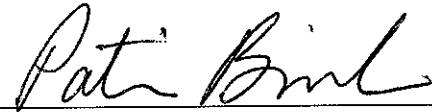
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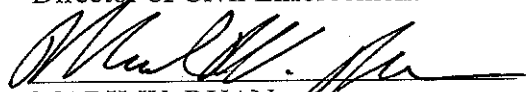
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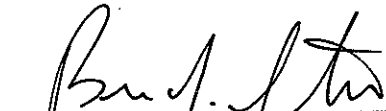
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